

ISSUE BRIEF

Caregiver Discrimination Under Title VII

The area of law known as “caregiver discrimination” describes a group of related legal theories under a number of existing federal and state laws. Among these, discrimination at work against mothers, fathers, and other employees based on their caregiving responsibilities can be actionable as sex discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII).

Caregiver stereotypes as sex-based stereotypes

Actions taken against employees at work based on their family caregiving responsibilities at home are actionable as sex discrimination because they rely on *sex-based stereotypes* about proper or expected roles for men and women—that women will or should be more focused on being caregivers for their children, while men will or should be more focused on being breadwinners at work. When an employer acts on the assumption that, for example, a female employee will be less committed or reliable at work or will not want to travel or work long hours because she has children, it acts based on *impermissible sex-based stereotypes of women as mothers*. Likewise, when an employer penalizes or retaliates against a male employee for taking a parental leave to which he was entitled or for participating actively in caring for his children outside of work, it acts based on *impermissible sex-based stereotypes that men should be focused on work, not family*.

Sex discrimination against mothers

The traditional way of proving sex discrimination under Title VII is to prove that an employee was treated worse than other employees outside of the protected classification—for example, that a more qualified woman was passed over for a promotion given to a man. The law has now advanced to recognize that, *even without having a comparator to point to who was treated better than she*, a woman who is penalized at work for being a mother can bring a case for sex discrimination. Under current law, treating a woman worse at work based on assumptions or stereotypes about her behavior because she is a mother is, itself, evidence of sex discrimination regardless of how other workers are treated.

Today, a woman who is treated worse at work because she is a mother can prove sex discrimination in violation of Title VII by using comparator, comparative, and/or stereotyping evidence. She can point to a comparator if she has one: either a man or father or a woman without children who was treated better than she. If there are no comparators to point to—for example, in a workplace that is all women or a job that is filled by only one or two people—she can use herself to provide comparative evidence: evidence that she was treated better at work before she had children and then worse once she became a mother.

Yet even without comparator or comparative evidence, she can make her case using stereotyping evidence: evidence that she was treated worse at work based on stereotypes or assumptions about how she would or should behave because she is a mother.

Gender stereotyping of fathers

When a man is treated worse at work for taking on a caregiving role, he, too, may experience sex discrimination, which he can prove using comparator, comparative, or stereotyping evidence. If mothers are treated better than fathers at work—for example, greater benefits provided to mothers than fathers, or time off for family care held against fathers but not mothers—this may be unlawful sex discrimination. (Note, however, that when it comes to disabling periods of pregnancy, birth mothers may be entitled lawfully to additional leave.)

Yet regardless of how mothers are treated, if a father is penalized at work for taking on a caregiver role—for example, viewed as less committed to work and denied a promotion because he is active in child care arrangements, or retaliated against after taking advantage of a family leave to which he is legally entitled—this may amount to gender stereotyping. Penalizing a man for failing to conform to masculine norms of focusing on work and leaving child care “to his wife” is also sex-based stereotyping.

Stereotypes that women will or should be focused on their children instead of work, and that men will or should be focused on their work instead of their children are both sex-based stereotypes. Whether an employee is penalized at work because she is assumed to conform to a feminine stereotype of mothers, or because he is viewed as failing to conform to a masculine stereotype of fathers, both can amount to unlawful sex discrimination under Title VII.

For more information, visit www.worklifelaw.org.

References

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